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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-756

HARRY SMITH, *et al.*,

Petitioners,

—v.—

DAWN SMITH, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENTS Wayne E. King, Superintendent; Robert Horst, Principal; Members of Board of Education; all of Harrisonburg City Public Schools.

W. W. WHARTON
PHILLIP C. STONE
of Wharton, Aldhizer & Weaver
90 North Main Street
Harrisonburg, Virginia 22801

Attorneys for Respondents
Wayne E. King, Superintendent;
Robert Horst, Principal; Members
of Board of Education; all of
Harrisonburg City Public Schools

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PRELIMINARY STATEMENT

The opinion of the Court of Appeals for the Fourth Circuit is reported at 523 F.2d 121.

Statements in the Petition as to Jurisdiction, Questions Presented, and When and How the Federal Questions Were Raised and Decided Below, are correct. These Respondents rely on the district court's statement of the facts as found in its opinion.

ARGUMENT

I. ZORACH SHOULD NOT BE OVERRULED

Petitioners state clearly that the objective of their appeal is to have this Court overrule Zorach v. Clauson, 343 U.S. 203 (1952) which permitted public schools to release children from school to attend religious activities off school property. The Petitioners are not able to show that the opinion of the Court of Appeals is contrary to an opinion of this Court. To the contrary, the objection is that Zorach was expressly adhered to by the Court of Appeals.

Neither can the Petitioners cite any conflict among the circuits to justify the Court granting a writ in this case. In fact, no claim is made that there are any other pending cases involving this issue.

The Petitioners, instead, claim that the Zorach decision should be overruled because of constitutional considerations already passed on by the Court in that case. The Petitioners note that the district court repudiated the decision of the Court of Appeals indicating some dissatisfiction with Zorach.

This Court, however, has already resolved the constitutional questions and Zorach stands as controlling authority in this case.

The difference between Zorach and McCollum v. Board of Education, 303 U.S. 203 (1948), which disallowed religious instruction in the classroom, is based on sound constitutional construction. The distinction was justified and explained by Mr. Justice Brennan in Abingdon School District v. Schempp, 374 U.S. 203, 261 (1963) who said that the distinction is "faithful to the functions of the Establishment Clause."

II. ZORACH HAS BEEN APPROVED BY SUBSEQUENT OPINIONS OF THIS COURT

Petitioners assert that the reasoning of Zorach has been substantially underminded by subsequent decisions of this Court. The suggestion that McCollum is not consistent with Zorach is of no significance since the Zorach decision was subsequent in time and presumably asserted controlling principles to the extent that the decisions

are inconsistent. However, in Abingdon School District v. Schempp, 374 U.S. 203 (1963), Mr. Justice Brennan, concurring, explained in some detail the valid and appropriate distinction between Zorach and McCollum. Nothing in his discussion nor in any church - state decision of this Court since Zorach even infers an erosion of the principles stated in Zorach.

To the contrary Zorach continues to be cited with approval by this Court, most recently in Meek v. Pittenger, _____ U.S. _____ (1975). Zorach has also been cited without any suggestions of criticism or qualification in several church - state cases since it was decided. Further, all present justices on the Court have authored or subscribed to opinions citing Zorach without any inference of criticisms.

The Court of Appeals applied the tripartite test in a fashion consistent to McCollum and Zorach and concluded that this case comes within the standards set by the test, as the schools aim only to accommodate the wishes of the students' parents and found that "Zorach illuminates the test." (App. 37).

III. THIS CASE IS FACTUALLY INDISTINGUISHABLE FROM ZORACH.

The Petitioners suggest that the facts of this case are distinguishable from Zorach so that even if the Court refuses to overrule its Zorach decision a writ should be awarded. But this is

contrary to the findings of both the district court and the Court of Appeals. The district court indicated that "Zorach is not readily distinguishable" from the present case. (App. 20) and the Court of Appeals stated that "the case is indistinguishable from and controlled by Zorach." (App. 35-36)

CONCLUSION

For the reasons stated the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. W. Wharton
Phillip C. Stone
Wharton, Aldhizer & Weaver
90 N. Main Street
Harrisonburg, VA 22801

Attorneys for Respondents

December 19, 1975